IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32398

FREDERICK J. ANDERSON,	)	**2007 Opinion No. 73A**
	)	
Petitioner-Appellant,	)	**Filed: November 2, 2007**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**AMENDED OPINION**
	)	**THE COURT'S PRIOR OPINION**
Respondent.	)	**DATED OCTOBER 31, 2007 IS**
	)	**HEREBY WITHDRAWN**

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Peter D. McDermott, District Judge.

Summary dismissal of petition for post-conviction relief, affirmed in part, reversed in part, and case remanded.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant. Justin M. Curtis argued.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent. Lori A. Fleming argued.

SCHWARTZMAN, Judge Pro Tem

Frederick J. Anderson appeals from the summary dismissal of his petition for post-conviction relief.

I.
FACTUAL & PROCEDURAL BACKGROUND

Frederick J. Anderson was originally charged with first degree murder by aggravated battery of a child under twelve, Idaho Code §§ 18-4001, -4003(d), and with being a persistent violator, I.C. § 19-2514. Pursuant to a plea agreement, he pleaded guilty to an amended charge of voluntary manslaughter, I.C. § 18-4006(1). Anderson was sentenced to a unified term of fifteen years, with seven years determinate. He then filed an Idaho Criminal Rule 35 motion for reduction of sentence, which the district court denied. This Court affirmed the sentence and

denial of the Rule 35 motion on appeal. *State v. Anderson*, Docket No. 30740 (Ct. App. April 15, 2005) (unpublished).

Anderson thereafter filed a petition for post-conviction relief, raising several claims, including the argument that counsel was ineffective for advising him that he did not have a viable challenge to the persistent violator enhancement. The state responded with an answer and a motion for summary judgment. Without providing further notice, the district court dismissed Anderson's petition for post-conviction relief after a hearing on the motion. Anderson now appeals, asserting that the state's motion for summary dismissal did not express the reasons for summary dismissal with particularity, and that he raised a genuine issue of material fact on his ineffective assistance of counsel claim regarding the persistent violator enhancement.

II.
DISCUSSION

A. Standard of Review

An action for post-conviction relief is civil in nature and is governed by the Idaho Rules of Civil Procedure. *Pizzuto v. State*, 127 Idaho 469, 470, 903 P.2d 58, 59 (1995); *Mata v. State*, 124 Idaho 588, 591, 861 P.2d 1253, 1256 (Ct. App. 1993). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action, however, for an application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal. We do not give evidentiary value to mere conclusory allegations that are unsupported by admissible evidence. *Drapeau v. State*, 103 Idaho 612, 617, 651 P.2d 546, 551 (Ct. App. 1982).

If the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle him to the requested relief, the trial court may summarily

dismiss a petition for post-conviction relief, either upon motion of a party or on the court's own initiative. I.C. § 19-4906; *Medrano v. State*, 127 Idaho 639, 643, 903 P.2d 1336, 1340 (Ct. App. 1995); *Gonzales v. State*, 120 Idaho 759, 761, 819 P.2d 1159, 1161 (Ct. App. 1991). On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file, liberally construing the facts and reasonable inferences in favor of the non-moving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

All of the claims that Anderson raised in his petition alleged ineffective assistance of counsel. In order to prevail on such a claim, the applicant must demonstrate by competent evidence both that his attorney's performance was deficient, and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995); *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To show deficient performance, a defendant must overcome the strong presumption that counsel's performance was adequate by demonstrating "that counsel's representation did not meet objective standards of competence." *Roman v. State*, 125 Idaho 644, 648-49, 873 P.2d 898, 902-03 (Ct. App. 1994). Strategic or tactical decisions will not be found to be deficient performance "unless those decisions are made upon a basis of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." *Davis*, 116 Idaho at 406, 775 P.2d at 1248. If a defendant succeeds in establishing that counsel's performance was deficient, he must also prove the prejudice element by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Roman*, 125 Idaho at 649, 873 P.2d at 903.

B. Analysis

In his petition for post-conviction relief, Anderson raised several claims, arguing that counsel was ineffective for (1) failing to challenge the interrogation procedures used by the police; (2) incorrectly advising him that he did not have a viable challenge to the persistent violator enhancement in light of the fact that one of his previous felonies had resulted in a withheld judgment; (3) failing to investigate Anderson's version of events; and (4) telling him

that he had no defense and coaching him on what to say so that his plea would be accepted.[1] The state's motion for summary judgment addressed only one of these issues, asserting that Anderson had shown neither deficient performance nor prejudice in his attorney's advice regarding the persistent violator enhancement. The state did not touch at all on Anderson's other three claims. Anderson argues that his petition for post-conviction relief was improperly dismissed because he did not receive sufficient notice of the evidentiary or legal deficiencies in his application. We agree in part.

1. Waiver

Initially, the state argues that Anderson cannot complain of lack of particularized notice in this appeal because he waived the issue by responding, without objection, to the state's motion to dismiss. This Court rejected that argument in *Franck-Teel v. State*, 143 Idaho 664, 152 P.3d 25 (Ct. App. 2006) *rev. denied*. *See also Garza v. State*, 139 Idaho 533, 82 P.3d 445 (2003). The state urges us to reconsider *Franck-Teel*. We decline the invitation.

2. The state's motion for summary dismissal

It is well established that a petitioner is entitled to notice and an opportunity to respond before his petition for post-conviction relief is dismissed. I.C. § 19-4906(b); *Saykhamchone v. State*, 127 Idaho 319, 321, 900 P.2d 795, 797 (1995); *State v. Christensen*, 102 Idaho 487, 488-89, 632 P.2d 676, 677-78 (1981); *Martinez v. State*, 126 Idaho 813, 892 P.2d 488 (Ct. App. 1995). If the dismissal is based upon the state's motion for summary dismissal, this requirement is met only if the motion states with particularity the ground on which summary dismissal is sought. *Saykhamchone*, 127 Idaho at 322, 900 P.2d at 798; *Christensen*; 102 Idaho at 488-89, 632 P.2d at 677-78. Broad and generic contentions of deficiencies in a petition for post-conviction relief do not suffice. *Franck-Teel*, 143 Idaho at 668-69, 152 P.3d at 29-30. Proper notice must refer to specific allegations in the petition on a claim-by-claim basis, and specifically refer to deficiencies in the evidence or additional legal analysis necessary to avoid summary

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[1] In his petition, Anderson also raised a fifth claim, arguing that counsel was ineffective for allowing the prosecuting attorney to threaten him with a life sentence if he did not plead guilty. On appeal, Anderson challenges neither the notice nor the ultimate dismissal of this claim. We note that notice was adequate because the state's motion to dismiss specifically addressed this claim. Even if this claim has not been abandoned on appeal, Anderson can show no prejudice because any threats of a life sentence under the persistent violator enhancement were subsumed by the murder charge. For these reasons, we will not discuss it further.

dismissal of the claim. *Id*. at 668, 152 P.3d at 29. *See also Crabtree v. State*, 144 Idaho 489, 494, 163 P.3d 1201, 1206 (Ct. App. 2006).

As noted above, the state's motion did not specifically address three of Anderson's claims. The state's general recitation of the required elements of ineffective assistance of counsel and the rules about conclusory allegations is insufficient to provide notice. Likewise, trial counsel's affidavit, which merely disputed the facts, did not explain why, as a matter of law and even assuming that the facts were resolved in Anderson's favor, the state was entitled to summary dismissal. The state's motion for summary dismissal simply did not furnish Anderson with the requisite notice on these three issues. *See Franck-Teel*, 143 Idaho at 669, 152 P.3d at 30.

Alternatively, the state argues that the inadequacy of notice was harmless error. Inadequate notice is harmless if the petitioner's response to the state's motion for summary dismissal reveals that the petitioner understood the basis for dismissal of the issues inadequately addressed in the motion to dismiss. *Franck-Teel*, 143 Idaho at 671, 152 P.3d at 32. The error here was not harmless.

Although post-conviction counsel for Anderson filed a response to the state's motion for summary disposition and argued the merits of each of his issues in a way that indicated that counsel understood the applicable legal standards and necessary evidence, counsel was responding to an "invisible target." *See Downing v. State*, 132 Idaho 861, 864, 979 P.2d 1219, 1222 (Ct. App. 1999). There had never been any articulation, by either the district court or the state, of the particular grounds for the dismissal of the three claims discussed above. As such, it is clear that Anderson's response was not "responsive to the district court's notice or any reason whatsoever for the eventual dismissal." *Id.* Under these circumstances, the error in not providing Anderson with the requisite notice cannot be held to be harmless.

3. The district court's sua sponte dismissal

In the post-conviction arena, the state's motion for summary dismissal and a district court notice of intent to dismiss are alternative ways to accomplish the same ends, that being notice of the particularized bases for summary dismissal and opportunity for the petitioner to respond to those proposed grounds for dismissal. *See Franck-Teel*, 143 Idaho at 668, 152 P.3d at 29. A district court need not provide the applicant with notice of the court's dismissal if it is in response to a sufficiently specific motion from the state. *Saykhamchone*, 127 Idaho at 322, 900

P.2d at 798; *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986). If the state's motion does not provide adequate notice, however, any dismissal granted by the district court will be treated as a sua sponte dismissal that requires the district court to give the applicant twenty days' notice of intent to dismiss, and the grounds therefore, pursuant to I.C. § 19-4906(b). *Murphy v. State*, 143 Idaho 139, 149, 139 P.3d 741, 751 (Ct. App. 2006); *Flores v. State*, 128 Idaho 476, 478, 915 P.2d 38, 40 (Ct. App. 1996). Likewise, if the district court dismisses an application on grounds other than those noticed in the motion, it too will be deemed a sua sponte dismissal. *Murphy*, 143 Idaho at 149, 139 P.3d at 751; *Baruth*, 110 Idaho at 159, 715 P.2d at 372. In such circumstances, the district court must provide the petitioner with adequate notice of the reasons for dismissal before the petition is dismissed. *Banks v. State*, 123 Idaho 953, 954, 855 P.2d 38, 39 (1993).

In this case, the district court detailed the bases for dismissal at the hearing and in its subsequent written order. Like the state, the district court focused primarily upon the effect of the withheld judgment on the persistent violator charge and the voluntariness of the plea. The court also took "judicial notice" of the underlying criminal record.[2] The court found that Anderson had voluntarily decided to plead guilty to voluntary manslaughter rather than risk a first degree murder conviction. The court articulated the ineffective assistance of counsel analysis, and generally noted that counsel's actions had been trial strategy. The court then indicated that it was going to dismiss the petition. We take no position on the merits of the district court's analysis, but to the extent that these actions amounted to a sua sponte dismissal, Anderson also did not receive adequate notice because he was given no opportunity to respond to the court's reasoning.

4. Dismissal of the claim of ineffective assistance of counsel regarding the persistent violator enhancement

We next turn to the substance of Anderson's claim that counsel was ineffective for advising him that he did not have a viable challenge to the persistent violator enhancement. On this issue notice was sufficient. The state argued that trial counsel's conclusion was correct, that the enhancement was inconsequential because it was dismissed, that Anderson received other

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[2] Although a court may certainly take judicial notice of the record in the underlying criminal case for purposes of ruling on the petition for post-conviction relief, *see Hays v. State*, 113 Idaho 736, 739, 745 P.2d 758, 761 (Ct. App. 1987), *aff'd*, 115 Idaho 315, 766 P.2d 785 (1988), it must still give adequate notice and an opportunity to respond.

consideration in exchange for his guilty plea, and that counsel's advice to plead guilty was a strategic decision. Because the state's motion specifically referred to this claim and outlined its deficiencies, Anderson had sufficient notice of the reasons for dismissal.

To prove deficient performance in the context of a guilty plea, where a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, we ask whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *Griffith v. State*, 121 Idaho 371, 373, 825 P.2d 94, 96 (Ct. App. 1992). *See also State v. Soto*, 121 Idaho 53, 55, 822 P.2d 572, 574 (Ct. App. 1991). When applying the prejudice prong to a case involving the entry of a guilty plea, the petitioner must show that counsel's deficient performance "affected the outcome of the plea process" in that "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. That is, a defendant must show that the subject matter of the mistake constituted "an important part of his decision to plead guilty." *McKeeth v. State*, 140 Idaho 847, 851, 103 P.3d 460, 464 (2004); *Hayes v. State*, 143 Idaho 88, 93, 137 P.3d 475, 480 (Ct. App. 2006). A petitioner's mere self-serving assertion that he would not have pleaded guilty absent the mistake need not be accepted by the trial court sitting as a fact finder. *Id.*

According to Anderson's petition, he told trial counsel that although he had been convicted of felony burglary in 1980 and felony possession of methamphetamine in 1998, the burglary charge had resulted in a withheld judgment, I.C. § 19-2601(3), and that he had been exonerated after he successfully completed probation. I.C. § 19-2604. He contends that trial counsel told him that this would have no effect on the persistent violator enhancement. Specifically, he alleges that counsel "advised the petitioner that his prior . . . record didn't matter, the state had filed the charge of persistent violator and if he didn't agree to the plea bargain . . . that the petitioner would get a life sentence and 'that was that.'"

Because it is dispositive, we will only address the prejudice prong of the ineffective assistance of counsel analysis.[3] In order to satisfy the prejudice prong of the *Strickland* analysis,

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[3] Since we are not addressing the deficient performance prong of the analysis, we need not decide whether counsel correctly concluded that a felony that has resulted in a withheld judgment qualifies as a previous conviction for purposes of the persistent violator statute. This issue is arguably an open question in Idaho. *See and compare Manners v. State, Bd. of*

Anderson was required to show a reasonable probability that he would not have pleaded guilty but instead would have insisted on going to trial. Anderson asserts that he would not have pleaded guilty if he had understood that he could not receive the persistent violator enhancement--a term of not less than five years with the possibility of a unified life sentence. I.C. § 19-2514. However, this could not have been a material part of his decision to plead guilty. The consequences of the sentence enhancement would be entirely subsumed by a first degree murder conviction which would carry, at the very least, a determinate term of ten years and a mandatory unified life term, I.C. § 18-4004. As the district court said:

> [Anderson] was originally charged by the Prosecutor's Office with Murder in the First Degree by Aggravated Battery, which would carry . . . up to life. Well, the maximum could be life without parole in a state correctional facility.
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> The State also charged him with being a Persistent Violator. Whether or not the Persistent Violator charge would have been viable or not wasn't really challenged, but I don't really think in ruling on this Petition, that that matters.
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> The plain and simple fact is that the charge was reduced by the State to Voluntary Manslaughter, and the Persistent Violator charge was dismissed by the State.
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> . . . .
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> It appeared to me that . . . after lengthy negotiations with his attorney, Mr. Anderson voluntarily decided to take a sure thing and enter a plea of guilty to Voluntary Manslaughter rather than risk getting convicted of First Degree Murder.

As such, there has not been a showing of prejudice, and the district court did not err in summarily dismissing this claim.

Veterinary Medicine, 107 Idaho 950, 952, 694 P.2d 1298, 1300 (1985) (A felony conviction which has been vacated and the charge dismissed after permitting the defendant to withdraw his guilty plea pursuant to I.C. § 19-2604 cannot be the basis for revocation of a veterinary license.); *State v. Cliett*, 96 Idaho 646, 649, 534 P.2d 476, 479 (1975) (A withheld judgment following a guilty plea did not result in a "conviction" for purposes of a statute allowing impeachment of witnesses by evidence of prior felony convictions.); *State v. O'Dell*, 71 Idaho 64, 225 P.2d 1020 (1950) (For purposes of the persistent violator statute, "conviction" occurs at the time of the plea.); *State v. Deitz*, 120 Idaho 755, 819 P.2d 1155 (Ct. App. 1991) (A penalty enhancement for multiple DUI could be sustained even when the earlier case had resulted in a withheld judgment.); *State v. Brandt*, 110 Idaho 341, 345, 715 P.2d 1011, 1015 (Ct. App. 1986) (A conviction under persistent violator statute occurs upon a determination of guilt, whether it be by a plea or result of jury verdict.).

III.

CONCLUSION

Because Anderson did not receive adequate notice of the reasons for dismissal, we reverse the dismissal of his claims that counsel was ineffective for failing to address the interrogation procedures, failing to investigate Anderson's version of events, and telling him he had no defense and coaching him on the wording of the plea. Anderson did have sufficient notice on his claim that counsel was ineffective for advising him that he did not have a viable challenge to the persistent violator enhancement. Because he did not show prejudice, we affirm the dismissal of this claim. This case is remanded to the district court for further proceedings consistent with the views expressed herein.

Chief Judge PERRY and Judge GUTIERREZ **CONCUR.**